

1 HONORABLE RICHARD A. JONES
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9
10 UNITED STATES DISTRICT COURT
11 WESTERN DISTRICT OF WASHINGTON
12 AT SEATTLE

13 DIGITAL MENTOR, INC.,
14 Plaintiff,
15 v.
16 Defendants.

17 Case No. C17-1935-RAJ
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19 ORDER
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24 OVIVO USA, LLC; OVIVO US
25 HOLDING INC.; VALERE
26 MORISSETTE; MARC BARBEAU;
27 DOES 1-20,

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This matter comes before the Court on Plaintiff Digital Mentor, Inc.'s ("Digital") Motion for Temporary Restraining Order and Preliminary Injunction and Motion for Expedited Discovery. Dkt. # 11. For the reasons that follow, the Court **GRANTS** Plaintiff's Motion for Temporary Restraining Order and **DENIES** Plaintiff's Motion for Expedited Discovery.

I. BACKGROUND

Digital is an engineering consulting service with its principal place of business in Incline Village, Nevada. Digital is registered to do business in the state of Washington. Dkt. # 1 ¶ 1. Digital developed a mobile computing system, DigitalMentor, for the waste and wastewater industry to allow companies to monitor and maintain their equipment on

mobile devices. *Id.* Defendant Ovivo USA, LLC provides equipment for water and wastewater treatment facilities throughout the United States and around the world. *Id.* ¶ 2. Defendant Ovivo US Holding Inc. is a Delaware corporation that owns Ovivo USA, LLC. Defendant Ovivo, Inc., is a Canadian corporation that owns Ovivo US Holding Inc. *Id.* ¶ 3. Defendant Valere Morissette is Vice President of Ovivo USA, LLC. *Id.* ¶ 6. Defendant Marc Barbeau is President of Ovivo USA, LLC, and President and CEO of Ovivo, Inc. *Id.* ¶ 7.

In March of 2014, Digital marketed DigitalMentor to Defendants for use in their facilities and in conjunction with the sale of their equipment. The parties then entered into a licensing agreement. Pursuant to that licensing agreement, Digital agreed to create and license DigitalMentor for Defendants' facilities and customers under the name "digitalOPS" and Defendants granted Digital a non-exclusive limited license to Defendants' Standard Operating Procedures ("SOP"), manuals, technical drawings, etc. Dkt. # 11-1 at 10; Dkt. # 23 at 5. On or about November 1, 2014, Digital and Ovivo entered into a Non-Disclosure Agreement ("NDA"). Digital claims that, while under these contracts, Defendants copied DigitalMentor and created a "pirated" version of this product called, WaterExpert.

On December 29, 2017, Digital filed a Complaint against Defendants seeking injunctive relief, alleging that Defendants violated the Defend Trade Secrets Act, 18 U.S.C. 1836, *et seq.* ("DTSA"), the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. 1961, *et seq.*, and committed trademark and copyright infringement. Digital also brings a breach of contract claim and several other state law claims.

II. DISCUSSION

A temporary restraining order is an "extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat.*

1 *Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008).¹ To obtain a temporary restraining order,
2 Digital must show that (1) it is likely to succeed on the merits, (2) it is likely to suffer
3 irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in its
4 favor, and (4) an injunction is in the public interest. *Stormans, Inc. v. Selecky*, 586 F.3d
5 1109, 1127 (9th Cir. 2009).

6 The Court finds that Digital demonstrated a likelihood of success on its breach of
7 contract claim.² The parties entered into a Master Agreement in conjunction with the
8 NDA. The NDA states that information that Digital revealed to Defendants regarding
9 DigitalMentor is confidential and that Defendants are not to copy the software disclosed
10 by Digital to Defendants under the terms of the agreement. Dkt. # 11 Ex. A. Digital
11 contends that Defendants used their access to DigitalMentor pursuant to the Master
12 Agreement to steal Digital's technology in violation of the NDA. Defendants do not
13 dispute that there was a contract between the parties, only that the development of
14 WaterExpert does not violate the contract. Defendants argue that they did not breach the
15 NDA because any information used by them was not confidential because Digital was
16 “extensively” marketing DigitalMentor, or was their intellectual property to use based on
17 the terms of the Master Agreement.

18 Based on the information available on the record at this time, Defendants'
19 arguments are not convincing. Demonstrating and marketing a product does not
20 immediately make the underlying technology of that product publicly available and free
21 from the designation of confidential or proprietary. Defendants' claim that similarities
22 between WaterExpert and DigitalMentor are merely a result of similar subject matter is
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24 ¹ The standard for issuing a temporary restraining order is identical to the standard for
25 issuing a preliminary injunction. *New Motor Vehicle Bd. of California v. Orrin W. Fox Co.*, 434
26 U.S. 1345, 1347 (1977).

27 ² As the Court need only find likelihood of success on one claim to grant a temporary
28 restricting order, Digital's remaining claims will not be analyzed at this time. See *League of
Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 760 (9th
Cir. 2014).

1 similarly unconvincing. Digital's claim alleges similarities beyond the utility of both
2 mobile computing systems in the water and wastewater treatment industries. Dkt. # 11-1
3 at 18.

4 Digital will also suffer irreparable harm if its motion for a temporary restraining
5 order is not granted. Digital is a small software engineering startup that developed
6 DigitalMentor through personal labor, financial investment and development of expertise
7 in the industry. Digital argues that Defendants' dominant position in the water and
8 wastewater treatment industry has the potential to push Digital out of the market and has
9 already substantially negatively impacted Digital's revenue and sales. In the absence of a
10 temporary restraining order, the future of Digital as a company might be in danger.

11 Considering Defendants' competitive advantage over Digital, the balance of
12 equities tips in Digital's favor. A temporary restraining order would preserve the status
13 quo until the preliminary injunction hearing is held. Further, granting the temporary
14 restraining order would be in the public interest. There is a public interest in upholding
15 NDA's, protecting intellectual property, and discouraging unfair business practices.
16 Accordingly, the Court **GRANTS** Digital's Motion for a Temporary Restraining Order.
17 Dkt. # 11.

18 The Court **ORDERS** that each properly served Defendant and their officers,
19 agents, servants, employees and attorneys, and all those acting in concert or participating
20 with them, are restrained and enjoined from engaging in, committing or performing,
21 either directly or indirectly, any and all of the following:

- 22 1. Using, disclosing, reproducing, summarizing, distributing, reverse engineering,
23 decompiling and/or disassembling Digital Mentor's confidential trade information,
trade secrets and/or copyrights;
- 24 2. Marketing, selling, using, offering for sale or otherwise distributing its product
25 known as WaterExpert and any other products, applications, databases or systems
designed and developed using Digital Mentor's intellectual property, confidential
information, trade secrets and/or copyrights;

- 1 3. Using any WaterExpert systems, platforms, products, applications or devices that
2 have already been distributed by Ovivo.
- 3 4. Destroying, concealing, altering, removing, altering, erasing, transferring or
4 deleting any and all documents, records or writings evidencing transactions,
5 communications or activities of or, in any way, related to the theft and infringement
6 of Digital Mentor's intellectual property and/or confidential information

7 This temporary restraining order is granted on a nationwide basis. The Court
8 declines to authorize a civil seizure of copies of WaterExpert and mobile devices
9 containing WaterExpert, and declines to Order deactivation of mobile applications for or
10 relating to WaterExpert, as it would be premature at this stage in the proceedings. **The**
11 **parties are instructed to submit a preliminary injunction briefing schedule to the**
12 **Court within two days of the issuance of this order. The Court sets a preliminary**
13 **injunction hearing at 10:00 a.m. on Monday, February 12, 2018.** The Court reserves
14 the matter of whether a bond must be posted until this hearing.

15 The Court **DENIES with leave to refile**, Digital's Motion for Expedited
16 Discovery. Dkt. # 11. A party may seek expedited discovery prior to a Rule 26(f)
17 conference for good cause. *Am. LegalNet, Inc. v. Davis*, 673 F. Supp. 2d 1063, 1066
18 (C.D. Cal. 2009). When considering whether good cause exists, courts consider "(1)"
19 whether a preliminary injunction is pending; (2) the breadth of the discovery requests; (3)
20 the purpose for requesting the expedited discovery; (4) the burden on the defendants to
21 comply with the requests; and (5) how far in advance of the typical discovery process the
22 request was made." *Id.* at 1067. Digital requests written discovery that will include
23 nineteen (19) Requests for Admissions, twenty-seven (27) Requests for Document
24 Production, and thirty-three (33) Special Interrogatories. Additionally, Digital requests
25 that the Court authorize depositions of ten (10) current and former employees of
26 Defendants, and issue subpoenas to compel the attendance of two witnesses at the
27 evidentiary hearing for preliminary injunction. The breadth of these discovery requests
28 as currently requested are not "narrow and targeted" and would be extremely burdensome

1 on Defendants within the requested timeframe. However, considering Digital's
2 contention that expedited discovery is necessary to allow them to prepare for the next
3 stage in these proceedings, the possibility of spoliation and destruction of evidence, and
4 Digital's desire to determine the extent of and to mitigate its alleged injuries, the Court
5 will allow Digital to attempt to cure the above deficiencies and refile its motion for
6 expedited discovery.

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8 DATED this 24th day of January, 2018.
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13 The Honorable Richard A. Jones
14 United States District Judge
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